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THE SHERMAN ACT AND THE NEW ANTI-TRUST LEGISLATION. II

The new anti-trust legislation comprises two statutes, the Federal Trade Commission act, signed by the President on September 26, 1914, and the so-called Clayton act, entitled "An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," signed on October 16, 1914. To some extent the two statutes overlap, in other respects they are supplementary, and the Clayton act also bears upon a variety of more or less unrelated matters which are not touched by the Trade Commission act. Neither statute is so good a specimen of draftsmanship as is the Sherman act, while the Clayton act, with its twenty-six sections and its heterogeneous subject-matter, is a particularly formless and unorganized piece of legislation. In statute-making, defects of form are prone to be associated with defects of substance, and there is reason to fear that there is such an association in the new anti-trust legislation, and more especially in the Clayton act. Graver defects than those of form might, in fact, be expected to be found in any legislation originated, formulated, and shaped as were these measures.

To approach the matter in another way, I must confess my own feeling of doubt as to just what general sort of change in the business situation the new legislation is intended to accomplish. It is clear, of course, that these statutes reflect the general public

policy that is declared in the Sherman act; that is, that competitive business conditions must be maintained and safeguarded. It is also clear that the new statutes are more detailed and specific in some of their condemnations than is the Sherman act. Moreover, additional administrative machinery is provided for the enforcement of the announced public policy. But despite all this it is not clear that the new legislation is based on any clear-cut and definite convictions as to the shortcomings of the Sherman act or as to the general principles on which supplementary legislation should be based. This does not in itself condemn the new legislation, for the question of the wisdom and effectiveness of its separate parts yet remains open. No one general purpose, but a variety of different purposes, characterizes the new laws. This is again a matter of origins and of legislative history.

The platform adopted at the Baltimore convention of the Democratic party in 1912 declared for "a vigorous enforcement of the criminal as well as the civil law against trusts and trust officials," and demanded the enactment of "such additional legislation as may be necessary to make it impossible for a private monopoly to exist in the United States." It added:

> We favor the declaration by law of the conditions upon which corporations shall be permitted to engage in interstate trade, including, among others, the prevention of holding companies, of interlocking directors, of stock watering, of discrimination in price, and the control by any one corporation of so large a proportion of any industry as to make it a menace to competitive conditions.

Regret was expressed that the Sherman act has received "a judicial construction depriving it of much of its efficacy," and legislation was favored restoring to that statute "the strength of which it has been deprived by such interpretation."

In the presidential campaign which followed much emphasis was put upon the Democratic party's attitude of hostility to monopoly; partly, no doubt, by way of contrast to the program of regulation announced by the Progressive party. But there was little talk of particular measures; it was such things as "the emancipation of business" as one part of the "new freedom" which figured most largely in the campaign.[1] After Mr. Wilson's election

[1] Cf. Woodrow Wilson, *The New Freedom*, chaps. viii, xi.

and inauguration no information was given out with respect to the anti-trust law program of the administration until the revision of the tariff and of the banking law had been achieved. Early in January, 1914, it was announced that Chairman Clayton of the House Committee on the Judiciary had drafted tentative bills covering the more important features of the President's anti-trust proposals.[1] On January 14, after a conference between President Wilson and the chairmen and some of the other Democratic members of the House Committee on the Judiciary and of the Senate Committee on Interstate and Foreign Commerce, a preliminary statement of the legislative program was given out. On January 20, following another conference with the same committeemen, the President addressed Congress on the subject of the proposed legislation, explaining its general outlines and warmly advocating its enaction. Such legislation should include, the President said, (1) the prohibition of interlocking directorates in banking, railroad, industrial, and public-service corporations, (2) provisions for regulation of railroad-security issues by the Interstate Commerce Commission, (3) the creation of an interstate trade commission, (4) the penalizing of officers and directors or other individuals responsible for the illegal activities of corporations, and (5) giving to private litigants the right to sue upon the basis of the findings in government suits, and permitting the statute of limitations to run against such individuals only from the date of the conclusion of the government action. The message further suggested, without positive recommendation, that limitations might be put upon the voting power of individuals or groups of individuals holding the controlling interests in supposedly competing companies.

[1] For that important part of the legislative history of the new statutes which lies outside the formal proceedings recorded in the *Congressional Record* I have had to rely very largely upon the Washington dispatches and correspondence in the daily papers. In particular I have examined the files of the *New York Evening Post*, the *New York Times*, and the *New York Journal of Commerce*. I have tried to refer to definite dates frequently enough to make it easy for anyone to check up my statements. It cannot be hoped that an account based on newspaper sources is entirely free from error, but I imagine that its general outlines are fairly accurate. So far as possible, of course, I have drawn my information from the *Congressional Record*, the various committee hearings, and prints of the bills in their successive stages.

These recommendations were partly in line with the statements of the Baltimore platform. They did not, like the platform, condemn mere size "as a menace to competitive conditions," nor did they contemplate restoring to the Sherman act an effectiveness of which, in fact, the decisions of the courts had never deprived it.[1] But in the third and fifth particulars mentioned above, the President's recommendations went farther than the party platform. The principal departure was in the advocacy of the establishment of an interstate trade commission, for the Democratic party had never declared itself in favor of a commission, although the creation of a commission was supported in both the Republican and the Progressive national platforms of 1912.

After the President's address had been delivered it was announced that his proposals would be embodied in five different bills, as follows: (1) the Interstate Trade Commission bill; (2) the Interlocking Directorates bill; (3) the Definitions bill, intended "to give further and more explicit legislative definition to the policy and meaning of the existing anti-trust law"; (4) the Trade Relations bill, dealing primarily with unfair competition and with matters of procedure in individual suits under the Sherman act; and (5) a Railway Securities bill.

The first four bills, it was announced, had been drafted by Representative Clayton of Alabama, chairman of the House Committee on the Judiciary, in consultation with Representatives Carlin of Virginia and Floyd of Arkansas, ranking Democratic members of the committee. The preparation of the Railway Securities bill was intrusted to the House Committee on Interstate and Foreign Commerce, whose chairman, Representative Adamson of Georgia, had already introduced a bill dealing with the same subject. It had been expected by the members of the House Committee on the Judiciary that their committee would consider, amend, and report upon the other four measures, but a vote of the

[1] This mistaken interpretation of the significance of the decisions of the Supreme Court in the Oil and Tobacco cases is expressed in many bills that have been introduced into Congress since those decisions. Most important of these, perhaps, were the bills introduced by Senator LaFollette in the 61st and 62d Congresses. In the recent session of the 63d Congress Representative Stanley of Kentucky was particularly active in the support of legislation designed to repair the damage supposed to have been done in these decisions. See his testimony before the House Committee on the Judiciary, Hearings, p. 65.

House, taken at the conclusion of the President's address, gave the Committee on Interstate Commerce jurisdiction over the Interstate Trade Commission bill as well as the Railway Securities bill.[1]

The four bills prepared by the House Committee on the Judiciary[2] were made public, in tentative form, on January 22. The Definitions bill and the Trade Relations bill contained many of the features and much of the phraseology of two of the "Seven Sisters" bills, enacted in New Jersey when Mr. Wilson, then President-elect, was governor of that state.[3] The Interlocking Directorates bill, applying as it did to banks and industrial corporations as well as to railroads and to corporations contracting with them, showed distinctly the influence of the Pujo committee's investigation of the money trust in 1912 and possibly of the disclosures of abuses of trust on the part of the officers and directors of several railroads.[4] The Interstate Trade Commission bill, drafted in consultation with Senator Newlands, chairman of the Senate Committee on Interstate Commerce, bore a close resemblance to the bill introduced by Senator Newlands in the Sixty-second Congress, as tentatively amended by his committee.[5] But it contained some new features.[6]

[1] A similar conflict over jurisdiction occurred in the Senate. There it was the Committee on Interstate and Foreign Commerce which had been selected to give general supervision to the administration measures, but the chairman of the Senate Committee on the Judiciary early announced that since it was that committee which had been principally concerned with the framing of the Sherman act (as well as the Interstate Commerce act) he would insist that all bills amending or supplementing the Sherman act be reported to it, although the Trade Commission and Interlocking Directorate bills might be referred to the other committee. Very likely the reason that the legislative supervision of the administration's program was first intrusted to the House Committee on the Judiciary and the Senate Committee on Interstate Commerce is that both of these committees had been actively concerned with anti-trust measures in the preceding Congress.

[2] Principally, it is understood, by Representatives Clayton, Carlin, and Floyd.

[3] Laws of New Jersey, 1913, chaps. 13, 15.

[4] But the Democratic national platforms of both 1908 and 1912 contained declarations in favor of the prohibition of interlocking directorates.

[5] Senate Report No. 7326, 62d Cong., 3d sess., p. 21.

[6] Attempts to increase this list of bills by securing administrative indorsement of a measure providing for the public regulation of stock exchanges were unsuccessful. If the press accounts are to be trusted, President Wilson chose to base his refusal to indorse such a measure upon the ground that the matter with which it dealt was not mentioned in the Baltimore platform. But as much could have been said of the Trade Commission bill and of the major portions of the Definitions and Trade Relations bills.

Because this last-named bill had to be referred to another House committee it was introduced at once (January 22) in both the House and Senate and was by each body referred to its Committee on Interstate Commerce. It was for this reason, possibly, that criticism first centered on the trade commission proposals. Both in and out of Congress there was less objection to the establishment of a trade commission than to any other part of the proposed legislation. The only questions seriously raised related to the powers and functions which should be given such a commission. The bill as first introduced provided for an interstate trade commission of five members, which was to absorb the Bureau of Corporations, and of which the Commissioner of Corporations was to be the first chairman. It was to be empowered (1) to require regular and special reports from all corporations engaged in interstate commerce (except common carriers), upon such matters and in such form as it should prescribe; (2) to subpoena witnesses and require the production of books and papers of all sorts; (3) to institute inquiries upon its own initiative or upon complaint to ascertain whether any corporation subject to the act was so organized and was conducting its business in such a way as to violate the Sherman act or any supplementary statutes, and to inform the Attorney-General of any violations so discovered; (4) to make similar investigations at the request of the Attorney-General or of a corporation itself, and, in case a violation of the law was discovered, to prepare a finding prescribing the changes and readjustments necessary to effect compliance with the law, in order that the finding might be used by the Attorney-General in terminating the unlawful condition either by agreement with the corporation or by suit; (5) to report (at the request of the court) upon any aspect of the litigation or of the proposed decree in suits in equity under the Sherman act, and (6) to make an annual report containing information collected by it and recommendations for additional legislation.

The commission was to be very much like the Bureau of Corporations, but with added dignity and increased powers. Its primary function was to be that of aiding the Department of Justice and the courts in the enforcement of the Sherman act and any supplementary statutes. In current discussion much emphasis

was put upon the usefulness of such a commission in planning the reorganization of monopolistic combinations and especially in the preparation of voluntary agreements for reorganization or dissolution and of "consent decrees." It was evidently expected that the Department of Justice would continue to be as successful as it has been in the past few years in securing the consent of corporations and combinations to the entering of decrees against them.[1]

The criticisms of the Trade Commission bill were of various sorts. Many critics thought that there was no necessity of subjecting small business enterprises engaged in interstate commerce to the control of the commission. Objections were also urged against the "inquisitorial powers" of the commission in respect to making all kinds of information about the conduct of business undertakings, including business secrets, matters of public record. It was not fair, it was said, to quote as a precedent the similar powers given to the Interstate Commerce Commission, for that commission dealt only with quasi-public corporations. On the other hand, the proposed statute did not go far enough to satisfy the radicals who wanted the commission empowered to regulate definitely the business operations of large combinations, or those less radical persons who wanted the commission empowered to grant clean bills of health to existing or proposed combinations or contracts in restraint of trade, which would carry with them immunity from prosecution under the Sherman act.

There was no agreement in favor of the bill in either the Senate or House Committee on Interstate Commerce, and it developed that Attorney-General McReynolds, who had not been consulted with respect to the original drafts of any of the proposed laws, felt that the powers of initiative proposed to be given to the commission might lead to some conflict with the Department of Justice in the enforcement of the anti-trust laws. On February 16, the House committee, which had been holding hearings on the bill since January 30, turned the bill over for redrafting to a special subcommittee of which Representative Covington of Maryland was

[1] This has been possibly the most significant recent development in the enforcement of the Sherman act. For a list of recent cases so settled see the *Annual Report of the Attorney-General*, 1914, p. 12. There is a good discussion of the matter in the testimony of Mr. F. H. Levy before the House Committee on the Judiciary, Hearings, p. 231.

made chairman. The revised measure (the "Covington bill") was not reported till March 16. It curtailed the powers of the proposed commission by providing (1) that annual reports should be required only from corporations with a capital of more than $5,000,000, smaller corporations being required to furnish such information only if belonging "to any class of corporations which the commission may make," (2) that no information obtained by the commission might be made public without its authorization, and (3) that investigations to determine the existence of violations of the anti-trust laws were to be made only at the direction of the President, the Attorney-General, or either House of Congress. The number of commissioners was reduced to three, and it was no longer provided that the Commissioner of Corporations should become ex officio a member of the new commission. This measure would have made the commission even more distinctly an arm of the Department of Justice, and in some respects its powers would have been less than those of the Bureau of Corporations.

In the meanwhile the Senate Committee on Interstate Commerce had been considering the original Clayton-Newlands Trade Commission bill, but had shown a disinclination to report it out as a separate measure. Some of the members of the committee thought that while the inquisitorial features of the bill went too far, in other respects insufficient power was given to the commission. Senators Cummins and Clapp, radical Republicans, became dissatisfied with the way in which the majority members of the committee took things into their own hands, and for a while withdrew from the discussions of the bill. The principal objections raised in this committee were to the other tentative measures which were still under discussion in the House Committee on the Judiciary. Particularly it was felt that the Definitions and Trade Relations bills would not strengthen the Sherman act. So it was proposed to formulate an omnibus measure which should cover the subjects of the trade commission, interlocking directorates, capitalization, and holding companies.[1] This bill was to be reported to the Senate as a substitute for any bills which the House might pass.

[1] The preparation of this measure was intrusted to a subcommittee, of which Senators Newlands and Cummins were active members. The bill was reported by the subcommittee to the full committee on May 1.

On May 22 the House, sitting as a committee of the whole, approved the Covington bill and on June 5 it was passed.[1] But the other pending anti-trust measures were passed by the House on the same day, and when these came to the Senate only the Covington bill and a railway securities bill were referred to the Committee on Interstate Commerce, the other measures being referred to the Judiciary Committee. Thus deprived of its jurisdiction over many of the matters covered in its proposed omnibus bill, the Committee on Interstate Commerce decided to report only its first eight sections, dealing with the trade commission.

But yet another factor had to be taken into account. On April 13 Representative Stevens of New Hampshire had introduced a trade commission bill as a substitute for the Covington bill which had already been favorably reported by the House Committee on Interstate Commerce, of which he was a member. In most respects it was much like the Covington bill, but it added two important administrative functions to the powers of investigation for which the Covington bill provided. These additional powers were (1) to compel the use of a uniform system of accounts by corporations making annual reports to the commission, and (2) to issue orders restraining the use of unfair methods in competition. This bill failed to secure consideration by the House, and on May 22 that body defeated by a decisive vote a proposed amendment to the Covington bill, providing for a uniform accounting system. The Stevens bill, in fact, was not more seriously considered than any other of the scores of anti-trust bills embodying the views of individual members of Congress.

But on June 12 Mr. Stevens, in company with Senator Hollis of New Hampshire and Mr. Louis D. Brandeis, whose views were expressed in the Stevens bill, conferred with President Wilson.

[1] The vote was not recorded, but a motion to recommit was defeated by a vote of 151 to 19.

As indicating the general approval of the creation of a trade commission a referendum vote of the United States Chamber of Commerce is significant. The local commercial organizations constituting that body reported 522 votes in favor of the establishment of the commission and only 124 as opposed. It is especially significant that the only feature disapproved was the section (of the original Clayton-Newlands draft) empowering the commission to report upon the legality of particular contracts or combinations upon the application of the parties concerned.

The result was that the Stevens bill was commended to the serious attention of the Senate Committee on Interstate Commerce.[1] It does not appear, however, that there was any general expectation that the legislative program of either the President or the committee would be seriously altered. It was thought to be too late to introduce new and highly debatable proposals into the Trade Commission bill. Moreover, the committee had had before it for some time a bill introduced by Senator Clapp of Minnesota, himself a member of the committee, which contained provisions with respect to the control of unfair competition very similar to those of the Stevens bill. But it became understood that the President favored these new proposals, and on June 12 the committee agreed to adopt the sections of the Stevens bill relating to unfair competitive practices. On June 13 the completed draft, containing the trade commission section[2] of the committee's proposed omnibus bill, together with the new provisions taken from the Stevens bill and one additional section providing for an immediate investigation of practices in foreign trade, was reported to the Senate.

When, on June 25, the debate on the bill was opened in the Senate, it became apparent that the control of unfair competition was to be the principal bone of contention. It was urged by opponents of the bill, including Democrats as well as Republicans, that the power of court review was inadequate, and it was claimed that the phrase "unfair competition" was too vague and uncertain in meaning to afford a reasonable criterion either for the commission or for business enterprises. And if given a rigid definition by the commission, it was said, it might stand in the way of successful

[1] This marks a change in the attitude of the administration. On January 26 President Wilson had stated to a group of senators and representatives his views of the functions of a trade commission. It was, he said, to be "smelling around all the time for rats"; its information should be at the disposal of all branches of the government, but it should be charged with the duty of bringing violations of the law to the attention of the Department of Justice; its findings were to be binding, the Attorney-General retaining the power to determine whether there had been a violation of the law; the commission was to assist the courts in the formulation of decrees. This, it will be noted, was merely an analysis and a detailed approval of the provisions of the original Clayton-Newlands bill.

[2] The proposed commission now appeared as the "*Federal* Trade Commission"—a name which was substituted for "Interstate Trade Commission" in order to prevent confusion with the Interstate Commerce Commission.

prosecutions under the Sherman act, in cases where practices used in achieving monopoly had not been called "unfair" by the commission.

Although, in the light of subsequent developments, it seems likely that the bill would have passed the Senate at any time that it could have been brought to the vote, the sponsors of the bill either overestimated the strength of the opposition or were themselves somewhat apathetic as to the fate of the provisions which had been taken over from the Stevens bill. As it was, some of the opposition seems to have been prompted by the desire to postpone action on the anti-trust bills till another session of Congress. Many amendments of the section dealing with unfair competition were offered, and at least four of these were submitted by individual members of the Committee on Interstate Commerce. Amendments offered by Senators Pomerene of Ohio, Hollis of New Hampshire, and Saulsbury of Delaware, all tended distinctly to lessen the powers of the commission. Senator Pomerene's proposal went farther than the others in this direction, for it provided that the findings of the commission should be subject to court review, both as to facts and as to law, and that new evidence might be brought into court if it were shown that it could not reasonably have been introduced before the commission.

The majority members of the Committee on Interstate Commerce decided that nothing much stronger than the Pomerene amendment would be accepted by the Senate, so Senators Pomerene and Walsh were appointed to prepare a revision of the section in question. The result (made public on July 30) was a slight modification of the original Pomerene draft, the principal difference being that the revised draft made the findings of the commission prima facie evidence in court proceedings, instead of leaving them on a parity with new evidence. It was reported, moreover, that the Democratic members of the Committee on Interstate Commerce were willing to cut the unfair-competition section out of the bill, in order not to block the progress of the anti-trust legislation. But, to their surprise, the Senate, on August 1, adopted Senator Cummins' relatively drastic substitute.[1] This

[1] The vote was 33 to 25. The division was not along party lines.

gave to the commission's findings substantially the same standing in court that now obtains in the case of the findings of the Interstate Commerce Commission.

The chief stumbling-block out of the way, further progress was easy. The bill had already received some minor amendments and a few more were added. On August 5 the bill passed the Senate by the vote of 53 to 16.[1]

The House refused to accept the Senate bill and a conference committee was appointed. The committee found difficulty in coming to an agreement, but there was less difference about the general power over unfair competition which the Senate bill gave the committee than over the matter of the judicial review of the exercise of that power. Finally it was arranged that the findings of the commission should be final as to matters of fact, the court review being limited to points of law. The commission cases were to go directly to the circuit courts of appeals instead of to the district courts. This was for the purpose of saving time and of preventing conflicting decisions. Appeals to the Supreme Court could be made only on writ of certiorari. The conference committee changed the offense against which the commission is to proceed from "unfair competition" to "unfair methods of competition." It also introduced a new provision, which permits the commission to refuse to investigate alleged instances of unfair competitive methods if it appears that no public good would follow from such proceeding. This saves the commission from having to follow up a host of complaints of petty offenses and allows it to refuse to be used as a means of annoying a complainant's competitors. With respect to the commission's general powers of investigation the conference committee adopted what were substantially the provisions of the House bill. The conference draft was accepted by the Senate on September 8 and by the House on September 10.[2]

In the meanwhile the progress of the other anti-trust measures had been even more halting. The tentative drafts of the Interlocking Directorates bill, the Definitions bill, and the Trade Relations bill remained in the hands of the House Committee on the

[1] Twelve Republicans voted for the bill and 14 against it.

[2] The vote was 43 to 5 in the Senate. There was no roll call in the House.

Judiciary, which began its hearings on these measures on January 29. In the hearings as well as in outside comment the Definitions and Trade Relations bills were severely criticized.

By the terms of the Trade Relations bill five sections were to be added to the Sherman act. The first section prohibited discriminations in price for the purpose of injuring or destroying a competitor of either the buyer or the seller, but permitted dealers "to select their own customers"[1] except for mine operators, who, like those engaged in public callings, were to be compelled to sell to all responsible persons who might apply. The second additional section prohibited factors' agreements. Another section made judgments for the government in suits under the act conclusive evidence in personal suits. Individuals were permitted to sue for injunctive relief against a threatened violation of the act, and it was specified that the first two additional sections should not be held to limit the meaning of the second section (condemning "monopolizing") of the original act.

The Definitions bill specified certain things that should be deemed to constitute "restraint of trade" or "monopolizing" under the Sherman act. These included agreements entered into with a purpose (1) to "carry out restrictions in trade" or acquire a monopoly, (2) to limit production or to increase prices, and (3) to prevent competition in making, selling, transporting, or purchasing any commodity. These specifications would have added nothing to the meaning of the Sherman act as interpreted by the courts. But a fourth clause was so sweeping in its condemnation that it must be quoted:

> To make any agreement, enter into any arrangement, or arrive at any understanding by which they, directly or indirectly, undertake to prevent a free and unrestricted competition among themselves or among any purchasers or consumers in the sale, production or transportation, of any production, or transportation of any product, article, or commodity.

It is hard to see how this clause could have been interpreted by the courts, even if the "light of reason" were utilized, except as preventing all agreements in restraint of trade, including those

[1] Thus permitting a manufacturer or jobber to refuse to sell to consumers and validating exclusive agency contracts.

reasonable and necessary agreements incident to the creation of a partnership or the sale of the good will of a business.

The Definitions bill made officers and directors personally liable for the violation of the act on the part of a corporation, and provided that it should not be held to limit or curtail the meaning or effect of the Sherman act. It was planned to add a paragraph relating to holding companies to the bill before it was introduced in the House.

The objections brought against the Definitions bill were more forceful than those directed against the Trade Relations bill. Business men likely to be affected by it objected to its sweeping condemnations, and many careful students of the Sherman act feared that, despite the disclaimer in the bill, the effect of any specific definitions of offenses under the act would be to render its application less elastic, and to harden and ultimately to limit its meaning. It was also suggested that it would take years to reach a definite judicial interpretation of the meaning of the various "definitions" in the bill.

The Interlocking Directorates bill, in its original form, prohibited any officer or director of a corporation (or member of a firm) engaged in producing or selling coal, structural steel, or other railroad supplies, or in conducting a bank or trust company from serving as an officer, director, or employee of a railroad or other interstate corporation. It also made it illegal for anyone to serve as officer, director, or employee of two or more banks if one was a federal reserve bank or a member of a federal reserve bank, and thus under federal jurisdiction. The presence of common directors in two or more corporations engaged in interstate commerce was made conclusive evidence of a combination in restraint of commerce subject to the penalties of the Sherman act.

The objections brought against this bill referred to such matters as the difficulty of making the necessary changes and adjustments within the two years allowed, the scarcity of men properly qualified for important directorships, the desirability of securing harmonious business policies (especially in the case of railroads), the encouragement that would be given to the election of "dummy directors," the advantage that the presence of the names of well-

known financiers gives in obtaining credit abroad, and the legitimacy of the representation of important financial interests on the directorates of all corporations in which such interests have large investments. In general, most of the critics held that the bill condemned a mass of necessary and useful arrangements in order to reach a few admittedly objectionable cases.

But, as in all similar cases, the logic of the specific criticism brought against the bills was less important than the general feeling with respect to the desirability of any legislation of the sort. It was apparent from the beginning that the support accorded these measures in Congress would be less cordial than that given to the Trade Commission bill. By March 1 it was reported that there was much disagreement in the House Committee on the Judiciary, and that the alignment of the members varied on the different bills. None of the measures, it was further reported, could command a majority in the Senate Committee on Interstate Commerce. This committee, as I have already said, decided to disregard these original drafts and to attach to its Trade Commission bill some sections covering part of the same ground. The Attorney-General, moreover, let it be understood that he did not favor any attempts at legislative definition of the general phrases of the Sherman act.[1] Under these conditions the opponents of further anti-trust legislation began to hope that Congress might content itself with establishing a trade commission.

At this crisis the administration showed itself distinctly resourceful. Although the President had on several occasions conferred with Representatives Clayton, Carlin, and Floyd, who were the sponsors for the bills, it was now stated that the bills should not be considered as having received his approval, and that they were merely tentative drafts intended to cover some of the reforms urged in the President's special message. Moreover, the President saw that there was cogency in the arguments of those who wished to have the Sherman act left intact, and he announced that he feared that attempts at rigid definitions might weaken the act.[2] The

[1] Importance must also be attached to the similar attitude of Representative Underwood, the majority leader in the House.

[2] First announced, so far as I can find, after a conference with the Attorney-General on February 18.

division of the proposed legislation into several bills was seen to be a tactical error. These separate measures were better targets for criticism than a single bill would have been, and at the same time they afforded a poorer rallying-ground for those who were willing to support the administration.

During March, Representatives Clayton, Carlin, and Floyd held several conferences with the President, and it became understood that the bills were to be rewritten so as to modify the language of the Trade Relations bill and reduce the scope of the Definitions and Interlocking Directorates bills. Finally, after a conference at the White House on April 3, it was announced that the House Committee on the Judiciary would bring out an "omnibus anti-trust bill," embracing revisions of the three bills already mentioned together with the Holding Companies bill. This last had been made public on March 17, and was by no means a drastic measure.

But there was yet another difficulty to reckon with. This had to do with the status of labor unions under the Sherman act. The sundry civil service appropriation bill which was passed by Congress in February, 1913, contained a provision forbidding the Department of Justice to utilize any money appropriated for the enforcement of the Sherman act in the prosecution of combinations of farmers or working-men. For this reason President Taft vetoed the measure, denouncing the exemption as vicious class legislation. When the Democrats came into power the bill, with the exemption section, was again passed. President Wilson approved the measure, but submitted with his approval a memorandum condemning the principle of the special exemption of certain classes from prosecution under the Sherman act. His approval, he said, would not have been given if it had not been for the urgent need of the appropriations and for the fact that other funds could be drawn upon, if need be, for the prosecution of the exempted combinations.

As soon as the preparation of the new anti-trust measures was begun the representatives of the unions let it be known that they intended to demand that their organizations, together with those of the agriculturists, should be specifically exempted from the condemnations of the Sherman act and of any supplementary legislation. President Wilson, had he so desired, could have supported

this demand without inconsistency. Frankly to limit the application of a statute against combinations in restraint in trade is a more defensible thing than to achieve the same result by crippling the administration of the statute while it is still couched in terms which have been held by the courts to apply to the actions of working-men as well as of capitalists. But the President did not choose this course. A sop was first offered to the unions by including in the draft of the proposed omnibus revision of the anti-trust bills a number of sections limiting and guarding the use of injunctions in labor disputes and providing for jury trials in contempt proceedings.[1] This did not satisfy the labor interests. Their views were embodied in the Bartlett-Bacon bill, one section of which read as follows:

> That it shall not be unlawful for persons employed or seeking employment to enter into any arrangements, agreements, or combinations with a view of lessening their hours of labor, or of increasing their wages, or of bettering their condition; nor shall any arrangements, agreements, or combinations be unlawful among persons engaged in horticulture or agriculture when made with the view of enhancing the price of agricultural or horticultural products.

But the President and the framers of the anti-trust bills were unwilling to grant a flat exemption. When the new Clayton omnibus bill was made public, on April 14, it contained the following:

> That nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of fraternal, labor, consumers', agricultural, or horticultural organizations; orders or associations operating under the lodge system,[2] instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such orders from carrying out the legitimate objects of such associations.

This section was perfectly harmless and well-nigh meaningless. It is reported that it was at first accepted as satisfactory by some of the labor leaders, but a vigorous and effective campaign to

[1] These provisions were taken over from the Clayton Injunction bill and the Clayton Contempt bill which had been favorably acted upon by the House at the previous session of Congress. They were interpreted as a fulfilment of pledges made in the Baltimore platform and would undoubtedly have been brought up for separate consideration if they had not been joined to the Anti-trust bill. As these sections have only an incidental bearing upon anti-trust legislation there will be no detailed consideration of them in this paper.

[2] When the bill was reported to the House by the committee the words "operating under the lodge system" had been stricken out.

secure more definite exemption soon developed. What was really wanted, there can be small doubt, was the legalizing of the secondary boycott. But it was then thought hopeless to expect Congress to grant this in any direct form, and hence the efforts of the labor leaders were bent toward securing a general clause which might be construed by the courts so as to secure the desired end. It was openly said that the labor vote would be used against members of Congress who would not support a strongly worded exemption section, and the administration was threatened with the defeat of the whole budget of anti-trust legislation.

At a conference between President Wilson and the ranking Democratic members of the House Committee on the Judiciary on May 16 it was agreed, if we may trust the reports, that the labor section as it stood went far enough. On May 19 Mr. Frank Morrison and Mr. Jackson M. Ralston, secretary and attorney, respectively, of the American Federation of Labor, together with Representative Lewis of Maryland, leader of the labor forces in the House, appeared before the House Committee on the Judiciary, but their demands were not granted. Finally, on May 24, fifteen labor members of the House conferred with the Democratic members of the Committee on the Judiciary, and two days later there was a similar conference at the White House. A compromise was agreed to, which consisted in amending the section in dispute by adding the words: "Nor shall such organizations, orders, or associations or the members thereof be construed or held to be illegal combinations in restraint of trade under the anti-trust laws." On June 1 this amendment was adopted by the House without a dissenting vote.[1]

Other aspects of the Clayton omnibus bill remain to be considered. It was introduced in the House on April 14 and referred to the Committee on the Judiciary. With minor changes it was favorably reported to the House on May 6. It contained, as we

[1] As the vote was not recorded there was an amusing scramble to get into the *Record*. A number of short statements of approval were made. For an account of the earlier history of the attempts of organized labor to secure this kind of legislation see Philip G. Wright, "The Contest in Congress between Organized Labor and Organized Business," *Quarterly Journal of Economics*, XXIX (February, 1915), 235.

have seen, new sections relating to injunctions and contempt proceedings as well as the exemption clause. The Definitions bill had been discarded and formed no part of the new measure. The Trade Relations bill had been thoroughly remodeled in phraseology and changed in other particulars. The section prohibiting factors' agreements was made to include tying contracts. These offenses, as well as unfair price discriminations, were no longer merely defined as attempts to monopolize trade or commerce, but were made specific misdemeanors, with specific penalties attached. The provisions of the Interlocking Directorate bill were distinctly softened. The prohibition of interlocking directorates between common carriers and banks was limited to cases in which the bank underwrites or purchases the carrier's securities. Two or more banks might have directors in common if no one of the banks had liabilities of more than $250,000.00 and if no two of the banks were located in a city with more than 100,000 inhabitants. Mutual savings banks not having a share capitalization were exempted, wherever located. Interlocking directorates in the cases of naturally competitive corporations, other than common carriers, engaged in interstate commerce were made definitely punishable instead of being held to constitute conclusive evidence of violation of the Sherman act. The sections prohibiting holding companies were to apply only to cases where the effect is to "eliminate or lessen competition" among the corporations. It will be seen that as compared with the original bills, the anti-trust sections of the new Clayton bill were distinctly moderate.

The bill was not brought to a vote until June 5, and although the House had shown itself to be distinctly apathetic with respect to the measure, it was passed by a vote of 275 to 54.[1] A few amendments were made by the House. The owners and operators of oil or gas wells, reduction works, refineries, and hydro-electric plants were, like mine-owners, forbidden to refuse to sell their products to responsible applicants. Another amendment provided that anti-trust suits might be brought in any district where a corporation "resides or is found or has an agent." More important than these

[1] The vote on this measure was not so distinctly bipartisan as that on the Covington bill. Only one Democrat voted against it.

was a new clause legalizing traffic associations and other organizations of railroad officials.[1]

The Senate referred the bill to the Committee on the Judiciary. The committee proceeded at once to strike out the amendment legalizing railroad organizations and the entire clause compelling mine-owners and others to sell to all responsible persons. Then it eliminated a clause providing that no person other than the United States should have the right to sue common carriers for injunctive relief from damages resulting from a violation of the Sherman act. The House bill had provided penalties for the violation of the sections dealing with price discriminations, tying contracts, and interlocking directorates. The committee substituted declarations of the illegality of these things and put the enforcement of the section into the hands of the proposed trade commission and the Interstate Commerce Commission.[2]

The amended bill was reported to the Senate on July 22. There the sections forbidding price discriminations and tying contracts were stricken out on the ground that these offenses were to be covered by the general power of the trade commission over unfair methods of competition.[3] On the last day of the debates in the Senate two further amendments were made. A new section was adopted making it unlawful for an interstate corporation to do business in any state in ways contrary to the laws of that state or of the state in which the corporation was chartered. And at the instance of Senator Cummins the declaration, "The labor of a human being is not a commodity or article of commerce," was added to the section legalizing labor combinations.[4] The bill, thus amended, passed the Senate on September 2 by a vote of 46 to 16.

[1] This was intended as an offset to the labor combination exemption. If retained in the bill it would probably have been ineffective, for it did not legalize agreements to "maintain rates." It had, however, the approval of the Interstate Commerce Commission.

[2] Record should be made of a curious amendment proposed by Senator Shields of Tennessee, which amounted to the declaration that acts in violation of the anti-trust statutes are unlawful and are prohibited.

[3] The section on tying contracts was later restored, then again stricken out, and finally put back in an amended form.

[4] The injunction sections of the House bill contained provisions legalizing picketing. These were stricken out by the Senate Committee on the Judiciary, but the Senate adopted a substitute, offered by Senator Cummins, which legalized both picketing and boycotting.

The conference committee had a difficult task, for the Senate changes were considerable and their net effect was to make the bill much less drastic. It was finally agreed, however, to restore the section forbidding price discriminations, but with the penal clause eliminated. The section in the House bill had condemned price discriminations made with intent "to injure the business" of a competitor of either seller or buyer, while the conference report made them illegal only when the effect may be to "substantially lessen competition or to create a monopoly." There was much difficulty over the matters of tying contracts, and of interlocking directorates, but the conference committee was able to come to a final agreement on September 23.

When the conference report was returned to the Senate opposition developed which at times threatened to take on the character of a filibuster. The thing chiefly attacked was that elimination of penal provisions for which the Senate itself was responsible. Senators who had not previously been known as hostile to large business interests joined with the representatives of non-radical opinion in condemning the alleged emasculation of the bill. Senator Reed of Missouri, who had previously made a number of unsuccessful attempts to secure the adoption of a radical amendment providing for receivers' sales of the property of combinations condemned under the Sherman act, was the principal opponent of this "capitulation to the trusts." Some of the opposition was, of course, based on the conviction that the proposed statute was inadequate to its purpose. But much of it represented a last attempt to delay action on the bill long enough to force an adjournment of Congress. The debate in the Senate dragged on until October 5, when the conference report was accepted by a vote of 35 to 24 after Senator Reed's motion to return the bill to conference with instruction to insist upon the penal clauses had been defeated by a very similar vote.[1] The debate in the House was along similar lines, but was much less prolonged. Yet the House did not vote upon the conference report until October 8, when it was approved by a vote of 244 to 54.

[1] Six Democrats voted for the motion to recommit, but only three voted against accepting the conference draft.

The Clayton act was thus the outcome of about eight months of deliberation. But in less degree even than is true of most important federal statutes, and in a markedly less degree than is true of the establishment of a trade commission, did it represent a real focus of the opinion of a majority of the members of Congress. Despite the large majority recorded in its favor the general attitude of Congress was that of unwillingly doing a set task. For many members of Congress the casting of a favorable vote was a matter of political exigency. Administrative pressure, party discipline, the political power of organized labor, and the undoubted fact that a majority of the voters at home would interpret a Congressman's vote against an "anti-trust" statute as a vote for monopoly were the dominant factors in the situation. And so many things were lumped together in the bill that it was impossible to segregate the good from the bad. The enaction of additional anti-trust legislation was in itself a praiseworthy carrying out of a party pledge. The particular shape which that legislation took is a matter in which the general views of the President, the pressure of interests strong enough, politically, to command a hearing, and the ideas of the few men actively interested, in Congress and out of it, who had definitely crystallized opinions as to what anti-trust legislation should be, each played a part.

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